IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOAN TOBER, an unmarried woman, Plaintiff/Appellant, v. CDC REALTY, L.L.C., an Arizona limited liability company, and LEE R. RAYBURN, an unmarried man, Defendants/Appellees.	2 CA-CV 2007-0044 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20057117

Honorable Leslie Miller, Judge

REVERSED AND REMANDED

Altfeld Battaile & Goldman, P.C.
By John C. E. Barrett — Tucson
Attorneys for Plaintiff/Appellant

Michael D. Miller — Tucson
Attorney for Defendants/Appellees

P E L A N D E R, Chief Judge.

¶1 In this contract action, plaintiff/appellant Joan Tober argues the trial court erred in granting summary judgment in favor of defendants/appellees CDC Realty, L.L.C. and Lee Rayburn (collectively Rayburn). She maintains the court overlooked disputes of material fact and misapplied the law. We conclude that Tober made a valid offer to Rayburn but that triable issues of fact exist on what that offer meant and required for acceptance. Accordingly, we find summary judgment inappropriate here and, therefore, reverse.

Background

¶2 "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). Rayburn formed CDC Realty, L.L.C., in 2001. In 2002, Tober, with whom Rayburn had had a romantic relationship, joined CDC as a member and half-owner. In January 2003, Tober became an independent contractor with CDC and voluntarily returned her employee salary check for that month. At some point during her work for CDC, Tober located a property at 8875 E. Broadway in Tucson ("the Broadway property") as a prospect for purchase by the company. In April 2003, Tober left CDC entirely, removing half the funds from its bank account.

¶3 Rayburn and Tober disputed the division of CDC's assets after Tober left the company and eventually agreed to mediate the dispute. In July 2003, the parties agreed to a mediated settlement, which called for Tober to receive, inter alia, "40% of the net proceeds

of any transaction(s) relating to" the Broadway property and half of CDC's other assets. Before Tober and Rayburn reached that agreement, Rayburn had made an offer of $191,000 for the Broadway property that was accepted with a lengthy due-diligence period. Rayburn's purchase of the property closed in September 2003.

¶4 On December 12, Tober contacted Rayburn by electronic mail (e-mail) and wrote:

> Next week I am going to have [a lawyer] draw up a statement relinquishing my rights to any proceeds from the Broadway subdivision. What I would like is a referral from the sale of the lot only.
>
> Also, if you plan to go to the McGraw's party I am not going. I will tell them that I am sick or have another commitment. I would also like to tell Marianne that you will be out of town for Christmas so she won't expect you to be at dinner.
>
> I really appreciate if you agree to these things.

¶5 Thereafter, Tober sent Rayburn a document dated December 15, 2003, entitled "Relinquishment of Proceeds from Property Located at 8875 E. Broadway" (hereinafter, the "relinquishment document"). It stated:

> 1. This document shall serve as notice to CDC Realty that I relinquish any rights or claims to any proceeds generated from the development and/or home sales from [the Broadway property].
>
> 2. This document shall render any and all previous agreements concerning any rights or claims to any proceeds generated from the development and/or home[] sales from subject property null and void.

3. This agreement is contingent upon the receipt by Joan A. Tober of a 25% referral fee of a 5% commission on the sales price of $191,000 on [the] property sent directly to Ms. Tober. A 25% referral fee of a 5% commission on the sales price of $191,000 is considered standard in the industry and shall be used in this instance.

4. Upon receipt of the referral check by Ms. Tober a copy of this document signed by both parties shall be filed at the Pima County Recorders Office with the deed for subject property.

The document included lines for both parties to sign and date. Tober had signed and dated the document December 15, 2003. She also included a letter stating that the document "relinquishe[d her] rights to any proceeds from the Broadway [property]," that the lawyers with whom she had conferred had "disagreed with what [she was] doing," and that, "[i]f you do not agree to this I will return any money you send."

¶6 On December 25, Rayburn e-mailed Tober but did not mention the relinquishment document. Tober responded the next day, asking him not to e-mail her again and stating she did not want his "gifts," "money," "houses," "subdivisions," "fame or fortune," "best wishes," or "written words." She did not mention the relinquishment document either.

¶7 Later, enclosed with a letter postmarked January 29, 2004, Rayburn sent Tober the relinquishment document she previously had signed, which he had signed and dated January 25, 2004. He also enclosed a voided check for the referral fee she had proposed in the document. In the letter, Rayburn stated he had never deposited but rather

had voided the check Tober had written to return her January 2003 salary. He said that, had the check been deposited in a timely fashion, "it would have been part of the company assets divided in [the] final agreement" and, therefore, been subject to the two-way split they had agreed to. Accordingly, he proposed that half of the check amount be used as an offset against the referral fee owed to Tober on the Broadway property under the relinquishment document.

¶8 On January 30, Rayburn e-mailed Tober, explaining that he had sent her [the January 29] letter about the relinquishment document and had "proposed . . . that [the salary check] be deducted from the referral." He asked her to "[p]lease ignore this" and stated he was "sending . . . a check for the referral as outlined in [the relinquishment document]." Tober averred she "d[id] not remember receiving" that e-mail. But on the same day, she sent Rayburn an angry e-mail, telling him "F[***] THE REFERRAL. YOU GAVE ME NOTHING IN THE PAST. I DON'T WANT ANYTHING FROM YOU . . . EXCEPT MAYBE LEAVE ARIZONA. DEAD IS ANOTHER GOOD ONE." Rayburn testified in his deposition that he had received that January 30 e-mail from Tober after sending his e-mail of the same date.[1]

[1]Tober's e-mail showed a time of "20:21:02 GMT." Rayburn's e-mail showed a time of "12:34:26 -0700." Although the significance of those time entries is somewhat unclear, Rayburn testified in his deposition that the e-mails were both sent from accounts that use Greenwich Mean Time. He also testified that, "[w]hen you send an e-mail they date stamp it local time plus or minus Greenwich Mean Time. When you receive an e-mail, they just stamp it Greenwich Mean Time." Therefore, he testified, his email was sent at "12:34 noon," and Tober's was sent at 1:21 p.m.

¶9 In an envelope apparently bearing two postmarks, one from January 30 and the other from January 31, Rayburn mailed to Tober another fully signed copy of the relinquishment document with a check dated January 29 for the full referral fee she had requested. Tober testified in her deposition that she did not recall when she had received the envelope but that she had returned it unopened.[2]

¶10 From February 2004 to May 2005, Tober e-mailed Rayburn on several occasions, mainly about personal issues but mentioning the Broadway property in a few of the e-mails. In one e-mail dated July 11, 2004, Tober told Rayburn that, if he wished to sell the property, he should record the "document relinquishing [her] rights to [it] . . . because there is another document that states [she has] rights to the profits on [it]." In another, dated July 18, she stated: "If you don't want to give me a referral on the lot . . . that's okay too." With respect to that e-mail, she later averred that "[her] email to Rayburn dated July 18, 2004, . . . is an acknowledgment that Rayburn had not fulfilled the contingency in Paragraph 3 of the 'Relinquishment Document' and refers only to the referral, not to [her] interest in the proceeds under the Mediation Agreement."

¶11 In September 2005, Tober's attorney wrote Rayburn a letter rescinding the relinquishment document, stating "the Relinquishment [document was] null, void, and

[2]At oral argument in this court, Rayburn asserted the two postmarks showed that he had mailed the envelope on January 30 and Tober had returned it the next day. No other evidence in the record directly supports that assertion, however, and the record is similarly silent as to the time of day Rayburn mailed the envelope, assuming he did so on the 30th.

without any force or effect" because Tober had "never received any payment whatsoever related to the contingency" and, therefore, Rayburn had "never fulfilled" "the contingency obligation." A few months later, Tober filed this action, claiming Rayburn had breached the parties' mediated settlement agreement. The parties cross-moved for summary judgment, and the trial court granted Rayburn's motion, finding the relinquishment document had been an offer by Tober that Rayburn had validly accepted. Tober moved for a new trial pursuant to Rule 59(a), Ariz. R. Civ. P., and the trial court denied the motion. This appeal followed.

Discussion

¶12 Tober contends the trial court erred in granting summary judgment because genuine issues of material fact exist and the court made incorrect legal rulings.[3] "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell*, 192 Ariz. 313, ¶ 8, 965 P.2d at 50. Summary judgment is inappropriate where "the evidence presented could lead 'reasonable minds' to draw different inferences therefrom." *Orme Sch. v. Reeves*, 166 Ariz. 301, 306, 802 P.2d 1000, 1005 (1990); *see also Horizon Res. Bethany Ltd. v. Cutco Indus., Inc.*, 180 Ariz. 72, 76, 881 P.2d 1177, 1181 (App. 1994) ("A motion for summary judgment should not be granted if there is evidence creating a genuine issue of

[3]Tober also maintains the trial court abused its discretion in denying her motion for new trial. She included that ruling in her notice of appeal. Because our decision on the grant of summary judgment disposes of the issues raised in that motion, however, we need not address it separately.

material fact."). But a "motion [for summary judgment] should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

I. Intent to make an offer

¶13 Tober argues "there is an issue of fact as to whether [she] *intended* the Relinquishment Document to be an offer that creat[ed] the power of acceptance in Rayburn."[4] She "denies that she intended to relinquish her rights under the Mediation Agreement." Because "[t]he circumstances surrounding the drafting and delivery of the Relinquishment Document permit the inference that Tober did *not* have the present intent to make an offer to Rayburn," she further argues, no contract relinquishing her rights under the mediation agreement was formed.

¶14 "For an enforceable contract to exist, there must be an offer, an acceptance, consideration, and sufficient specification of terms so that obligations involved can be ascertained." *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212,

[4]Rayburn points out that Tober filed a cross-motion for summary judgment below and "did not argue disputed facts" until the trial court ruled in Rayburn's favor, after which Tober "reverse[d] direction and argue[d] that her subjective 'state of mind' create[d] a genuine issue of material fact." But Tober did argue in her motion for new trial below that disputes of fact existed, and she appeals from the denial of that motion. In any event, "[a]n appellant is . . . not estopped by filing a motion for summary judgment from asserting that genuine issues of fact exist." *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 161 Ariz. 420, 424, 778 P.2d 1316, 1320 (App. 1989), *reversed on other grounds*, 165 Ariz. 31, 796 P.2d 463 (1990).

677 P.2d 1317, 1320 (App. 1983). Thus, the parties' execution of the relinquishment document could form a binding contract only if Tober made an offer when she sent that document to Rayburn. "An offer is '. . . a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *Id.* at 212, 677 P.2d at 1320, *quoting* Restatement (Second) of Contracts § 24 (1981).

¶15 As noted above, Tober informed Rayburn that, despite the mediation agreement, she wanted "a referral from the sale of the lot only" and planned to "relinquish[] [her] rights to any proceeds from [developing] the Broadway [property]." The relinquishment document she drafted clearly stated it "shall render any and all previous agreements concerning any rights or claims to any proceeds generated from the development and/or home[] sales from [the Broadway] property null and void." The document further stated that, upon receipt of the specified referral fee, Tober would "relinquish any rights or claims to any proceeds generated from the development and/or home sales from [that] property." In a letter Tober sent with the relinquishment document, she also confirmed that the document "relinquishe[d her] rights to any proceeds from the Broadway [property]." Thus, the document and supporting e-mails unmistakably demonstrated Tober's "willingness to enter into a bargain" and, at a minimum, strongly implied that Rayburn's "assent to that bargain [wa]s invited and w[ould] conclude it." Restatement (Second) of Contracts § 24.

¶16 Attempting to show that the record supports her argument that no offer was made, Tober relies on her affidavit below, in which she averred: "My email dated December 26, 2003 to Rayburn . . . was a plea for him to leave me alone. I never intended this email to relinquish any of my rights to any proceeds under the Mediation Agreement or under the Relinquishment Agreement." Tober's e-mail, however, did not refer to the relinquishment document and stated broadly that she did not want *any* money from Rayburn. In her affidavit, Tober merely stated that she did not intend her December 26 e-mail to relinquish her rights under either the mediation agreement or the relinquishment document—she did not aver that she had not intended the relinquishment document itself to extinguish her rights under the mediation agreement. In fact, in her affidavit she characterized the relinquishment document as providing that, "in exchange for receipt of the referral fee for finding the [Broadway property], [she] would give up [her] right to the 40% proceeds from the sale of any houses built on that lot." Thus, although generally "[t]he determination of intent [to be bound by a contract] is a factual question," the record does not support Tober's assertion that there was any factual dispute on this point. *Tabler v. Indus. Comm'n*, 202 Ariz. 518, ¶ 12, 47 P.3d 1156, 1159 (App. 2002).

¶17 Likewise, that a court "may consider surrounding circumstances and the conduct of the parties" does not support Tober's argument that a dispute of material fact exists over whether she made an offer. *Id.* ¶ 13; *see also Malcoff v. Coyier*, 14 Ariz. App. 524, 526, 484 P.2d 1053, 1055 (1971) ("The very existence of the contract itself, the

meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt, not only from the words used, but also from the situation, acts and conduct of the parties, and from the attendant circumstances."). Tober points to the fact that she "wrote and delivered the Relinquishment Document at a time when the romantic relationship was suffering." Even considering those circumstances, however, we cannot say the general evidence of problems in the personal relationship between Tober and Rayburn was any more than "a 'scintilla'" which could arguably "create the 'slightest doubt'" about Tober's intent. *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Such a scintilla of evidence is "insufficient to withstand a motion for summary judgment." *Id.*

¶18 Importantly, as Rayburn points out, "[t]he determination of the parties' intent must be based on objective evidence, not the hidden intent of the parties." *Tabler*, 202 Ariz. 518, ¶ 13, 47 P.3d at 1159. And, "[i]t is well established that the opponent of a motion for summary judgment does not raise an issue of fact by merely stating in the record that an issue of fact exists, but rather . . . must show that competent evidence is available which will justify a trial on that issue." *Cullison v. City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). The record before us contains no such evidence on the issue of whether Tober made an offer that Rayburn could accept.

¶19 Tober also suggests, however, that Rayburn should have "suspect[ed] that [she] was not making an offer to relinquish her more lucrative rights under the [mediation a]greement," in view of the fact that "[t]he 'offer' was embedded in discussion that is likely

routine at the end of a long-term romantic relationship." Quoting Restatement (Second) of Contracts § 26, she suggests that no offer was made because Rayburn had "'reason to know that [she did] not intend to conclude a bargain.'" In its entirety, however, that section addresses "Preliminary Negotiations" and provides: "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." Restatement (Second) of Contracts § 26.

¶20 We find that section of the Restatement inapplicable in this context because nothing in the relinquishment document suggested it was merely a preliminary part of an ongoing contract discussion. *Cf. Burkett v. Morales*, 128 Ariz. 417, 419, 626 P.2d 147, 148 (App. 1981) ("Whether the parties intend to be bound only after the execution of a formal written agreement is a question of fact," but "sometimes the facts will permit only one inference to be drawn and the issue becomes a question of law."). And we cannot agree with Tober's contention that, because she "was clearly suffering when she sent the Relinquishment Document," Rayburn should have known that she had not meant to convey an offer or "approve of the terms of her own proposed agreement." *Muchesko v. Muchesko*, 191 Ariz. 265, 269, 955 P.2d 21, 25 (App. 1997) ("Husband had no reason to believe Wife did not approve of the terms of her own proposed agreement. Wife did not indicate that the agreement was conditional or that she did not approve of its terms.").

¶21 Finally, Tober argues broadly that summary judgment is particularly inappropriate when questions of fact about intent are involved. Indeed, our supreme court has stated that, "if a material issue concerns the state of mind or intent of one of the parties, summary judgment normally is not appropriate." *Mid-Century Ins. Co. v. Duzykowski*, 131 Ariz. 428, 429, 641 P.2d 1272, 1273 (1982). But the law is also clear that "[w]hen the facts pertaining to a state of mind are . . . clear[,] . . . the trial court is justified in granting summary judgment." *Reidy v. Almich*, 4 Ariz. App. 144, 149, 418 P.2d 390, 395 (1966). The record does not reflect any genuine issues of material fact relating to Tober's intent in making an offer in her relinquishment document. In sum, we cannot say the trial court erred in determining that Tober had made a valid offer in that document.

II. Terms of offer

¶22 Tober also argues the trial court erred in applying the law "when it concluded that Rayburn accepted the offer and a contract was created." As explained in detail above, after receiving Tober's relinquishment document, Rayburn signed and returned it along with a voided, non-negotiable check for the referral fee. He also proposed offsetting against the referral fee half of Tober's January 2003 salary check that he believed she owed CDC. The trial court ruled that Rayburn's proposal did not constitute a counteroffer but, rather, that he had "accepted the contract and agreed to pay the amount." Therefore, the court ruled, Rayburn had accepted Tober's offer, and a valid contract had been formed.

¶23 Tober, however, maintains that "Rayburn's response did not rise to the level of an unqualified acceptance because it failed to conform to the method of acceptance required by the offer itself." In their briefs, both parties assert the material facts on this issue are undisputed; but we are not bound by those assertions. *See Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 161 Ariz. 420, 424, 778 P.2d 1316, 1320 (App. 1989), *reversed on other grounds*, 165 Ariz. 31, 796 P.2d 463 (1990) ("As a general rule if both parties file opposing motions for summary judgment, the court is not constrained to grant either motion if a genuine issue of material fact exists."). "And, '[e]ven when the facts are undisputed, summary disposition is unwarranted if different inferences may be drawn from those facts.'" *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 8, 86 P.3d 944, 948 (App. 2004), *quoting Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 508, 794 P.2d 138, 141 (1990).

¶24 As explained above, for a valid contract to exist, the offeree must accept the offeror's offer. *K-Line Builders*, 139 Ariz. at 212, 677 P.2d at 1320. "An acceptance is '. . . a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.'" *Id.*, *quoting* Restatement (Second) of Contracts § 50. "In order to create a contract, the acceptance of the offer must be unequivocal." *Clark v. Compania Ganadera de Cananea, S.A.*, 94 Ariz. 391, 400, 385 P.2d 691, 697 (1963). "An acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested." *Id.* Tober argues that the relinquishment document "unambiguously set forth the manner and terms of the acceptance" and that Rayburn "did

not conform his 'acceptance' to th[o]se terms." To determine whether Rayburn validly accepted Tober's offer, we must first consider what the language of the offer meant and required with respect to the manner and terms of acceptance.

¶25 General contract law provides that "[a]n offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance." Restatement (Second) of Contracts § 30(1).[5] In addition, "[i]f an offer prescribes the . . . manner of acceptance its terms in this respect must be complied with in order to create a contract." Restatement (Second) of Contracts § 60. Relying on this principle, Tober argues that her offer required Rayburn to accept by paying the requested referral fee and that, because he sent only a voided check on January 29, Rayburn failed to properly accept. Rayburn, in contrast, contends that Tober's inclusion of signature lines in the relinquishment document, her plan to ultimately record that document, and the request in her earlier December 12 e-mail that Rayburn "agree to these things," show that he could accept the offer with a promise to abide by her terms and perform accordingly.

¶26 In support of his position, Rayburn cites two cases that the trial court relied on in its ruling below: *Hart v. Hart*, 544 S.E.2d 366 (Va. Ct. App. 2001); and *Gleeson v. Frahm*, 320 N.W.2d 95 (Neb. 1982). The trial court stated that, in *Hart*,

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[5]We note that "[w]here we have no pertinent Arizona decisions, this court generally follows the Restatement whenever applicable." *Elia v. Pifer*, 194 Ariz. 74, ¶ 34, 977 P.2d 796, 803 (App. 1998).

> the court found that where an option contract states no provision for the payment of the purchase price at the time the optionee exercises the option, or where the contract is silent as to the time of payment, payment is not required where the purchaser has communicated his intention to exercise the option. The communication of the intent is sufficient for acceptance.

But the *Hart* court also made clear that "[t]he language of the option determines the method of required acceptance" and that, "unless the parties specify . . . a requirement [to tender payment as the method of exercising the option], tender is not necessary in order to exercise the option." *Hart*, 544 S.E.2d at 373.

¶27 Indeed, quoting at length from the *American Law Reports*, the court in *Hart* stated:

> [W]here an option contract does not provide for payment of the purchase price at the time of, or coincident with, an optionee's exercise or attempted exercise of the option, or where such contract is silent as to the time of payment, the courts have usually adhered to the view, sometimes referred to as the general rule, that in such circumstances payment is not a necessary requisite to exercise but is instead simply one of the acts required of the optionee in performance of his part of the bilateral contract of purchase and sale which was formed when he communicated to the optionor his election or intention to exercise the option and thereby accepted the optionee's offer.

Id., *quoting* 71 A.L.R.3d 1201 § 2 (1976) (alteration in *Hart*). And, as Tober points out, the divorce decree in *Hart* that included the option at issue "did not specify that tender of payment was a condition precedent to accepting the offer. In fact, the decree made no mention of the method or timing of payment." *Hart*, 544 S.E.2d at 374.

¶28 Likewise, in *Gleeson*, the Nebraska court found that Gleeson had exercised the option at issue. But it did so on the basis that, "[w]here the manner of acceptance is not specified, the holder may exercise by promising to perform what the option requires of him." *Gleeson*, 320 N.W.2d at 97. The court in *Gleeson* found that "[t]he option contract . . . d[id] not specify any particular manner of exercise or acceptance." *Id.*

¶29 Both *Hart* and *Gleeson* are also consistent with the Restatement principle that, "[u]nless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." Restatement (Second) of Contracts § 30(2). But that section's caveat, "[u]nless otherwise indicated by the language," is critical here. *Id.* We must determine whether the words Tober used in her offer necessarily required a specific manner of acceptance or, rather, merely "referr[ed] to a particular mode of acceptance [which] is often intended and understood as suggestion rather than limitation." Restatement (Second) of Contracts § 30 cmt. b; *see also* Restatement (Second) of Contracts § 60 cmt. a.

¶30 Tober's offer stated, "This agreement is contingent upon the receipt by Joan A. Tober of a 25% referral fee of a 5% commission on the sales price of $191,000 on [the Broadway] property sent directly to Ms. Tober." The term "contingent" means "[p]ossible" or "[d]ependent on something else; conditional." *Black's Law Dictionary* 338 (8th ed. 2004). But it is unclear from the contingency language in Tober's offer whether *formation* of a contract was contingent upon payment because it does not expressly state that Rayburn

could only accept by paying Tober the referral fee. On the one hand, the offer could reasonably be interpreted to require acceptance solely in a particular, specified manner—payment of the referral fee. On the other hand, as Rayburn argues, it could also be reasonably interpreted to mean that Tober's performance under the contract was contingent upon Rayburn's performance by paying the referral fee. *Cf. Vales v. Kings Hill Condo. Ass'n*, 211 Ariz. 561, ¶ 22, 125 P.3d 381, 388 (App. 2005) ("[T]he language of the [contract] amendment is ambiguous because it can reasonably be construed as having more than one meaning.").

¶31 Because Tober's offer is reasonably susceptible to more than one interpretation, questions of fact remain as to what the offer required. Therefore, we cannot say as a matter of law that Rayburn's mailing on January 29, when he first returned to Tober a signed and dated copy of the relinquishment document, constituted a valid acceptance. *See Firchau v. Barringer Crater Co.*, 86 Ariz. 215, 222, 344 P.2d 486, 490-91 (1959) ("'[W]here the existence and not the validity or construction of a contract or the terms thereof is the point in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether the contract did in fact exist.'"), *quoting* former 17 C.J.S. Contracts § 611, now 17B C.J.S. Contracts § 771(1999); *see also Pre-Fit Door, Inc. v. Dor-Ways, Inc.*, 13 Ariz. App. 438, 441, 477 P.2d 557, 560 (1970).

¶32 We note, as did the trial court, that, under Restatement (Second) of Contracts § 32, "[i]n case of doubt an offer is interpreted as inviting the offeree to accept either by

promising to perform what the offer requests or by rendering the performance, as the offeree chooses." But the Restatement requires consideration of both "the language [and] the circumstances" of an offer to determine whether an offer requires a particular means of acceptance. Restatement (Second) of Contracts § 30(2). Because varying inferences reasonably can be drawn from the language and circumstances here, factual questions remain about what Tober's offer meant and required. And, because any determination of whether Rayburn validly accepted the offer hinges on resolution of that factual dispute, summary judgment was inappropriate here.

¶33 Anticipating that other issues raised and briefed by the parties are likely to recur on remand, we briefly address them. *See Envtl. Liners, Inc. v. Ryley, Carlock & Applewhite*, 187 Ariz. 379, 383, 930 P.2d 456, 460 (App. 1996). If, on remand, the trier of fact determines Tober's offer could only be accepted by Rayburn's payment of the referral fee, and not merely by a promise or later performance, then Rayburn's response on January 29 would constitute a counteroffer. *See* Restatement (Second) of Contracts § 60, cmt. a ("If the offeror prescribes the only way in which his offer may be accepted, an acceptance in any other way is a counter-offer."). And, "[a]n offeree's power of acceptance is terminated by his making of a counter-offer." Restatement (Second) of Contracts § 39(2). Thus, if the trier of fact determines Tober's offer required acceptance only by payment of the referral fee, Rayburn's January 29 counteroffer terminated his power to accept the offer, and none of his subsequent attempts to pay the fee could effect an acceptance. *Id.*

¶34 In view of our ruling and the remaining questions of fact, we do not address the parties' various arguments as to the proper result should the trier of fact determine that Tober's offer did not condition a valid acceptance on actual payment of the referral fee but, rather, essentially "invite[d] acceptance in any manner and by any medium reasonable in the circumstances." Restatement (Second) of Contracts § 30(2). These include Tober's argument that Rayburn's mailing on January 29 could nonetheless be a counteroffer on some other legal basis, such as Restatement (Second) Contracts § 39(1),[6] and whether Tober effectively withdrew her offer with her e-mail of January 30, in which she stated: "F[***] THE REFERRAL. YOU GAVE ME NOTHING IN THE PAST. I DON'T WANT ANYTHING FROM YOU." Similarly, we do not address Rayburn's argument that his "email of January 30 . . . indicat[ing] that he ha[d] already deposited the payment into the mail" constituted a valid acceptance or his contention, raised for the first time at oral argument, relating to that mailing and the so-called "mailbox rule." *See Salt River Project Agric. Improvement & Power Dist. v. Ariz. Dep't of Econ. Sec.*, 156 Ariz. 155, 157, 750 P.2d 913, 915 (App. 1988) ("[A]n acceptance of a valid offer becomes effective as soon as the letter of acceptance is deposited in the mail.").

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[6]Restatement (Second) of Contracts § 39(1) provides: "A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer." But "[a] mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer, is ordinarily not a counter-offer." Restatement (Second) of Contracts § 39, cmt. b.

¶35 In sum, because questions of fact exist as to whether Tober's offer required acceptance by a particular means, summary judgment in favor of Rayburn was inappropriate. *Orme Sch.*, 166 Ariz. at 306, 802 P.2d at 1005.

Disposition

¶36 The judgment of the trial court is reversed. In our discretion, Tober's request for an award of attorney fees on appeal, made pursuant to A.R.S. § 12-341.01, is denied. *See Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164, 876 P.2d 1190, 1199 (App. 1994); *Andrews v. Blake*, 205 Ariz. 236, ¶ 55, 69 P.3d 7, 22 (2003); *see also Nestle Ice Cream Co. v. Fuller*, 186 Ariz. 521, 525-26, 924 P.2d 1040, 1044-45 (App. 1996).

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge